United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: September 30, 1999

TO : Peter B. Hoffman, Regional Director

Region 34

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: Alpine Windows, Inc.

34-CA-8689 512-0125-9800 524-0133-7500 524-5013-7000

524-5012-7000 177-2401-9000 625-4433-4200

625-4433-4233-0400

This case was submitted for advice as to whether a union "salt" was a *bona fide* job applicant, such that the Employer violated Section 8(a)(1) and (3) by refusing to offer him employment.

FACTS

John Mazzone is a full-time paid organizer for the Union. He has held this position for approximately one year. As organizer, Mazzone is responsible for locating and initiating Union organization campaigns at facilities which are not covered by a collective bargaining agreement. Before becoming a Union organizer, Mazzone worked for 15 years as a Union glass glazier. This case is the first time that Mazzone applied for work under a "salting" program.

The Employer manufactures aluminum windows for non-retail sale at its facility in Chester, New York. It employs up to four full-time employees. Employer owner Larry Maddaloni oversees the work.

On or about September 1, Mazzone saw an ad, placed by the Employer, in a local "Pennysaver" paper seeking window factory workers. He contacted the number listed in the advertisement and spoke to a man who identified himself as "Larry." Larry told Mazzone to come to the facility on the following day for a job interview.

International Brotherhood of Painters and Allied Trades, District Council 9, AFL-CIO.

The following day Mazzone went to the Employer's facility and taped the employment interview, using a handheld miniature tape recording device. The tape is a clear recording of the parties' conversation.

After a brief discussion regarding Mazzone's background, the Employer informed Mazzone that he could begin work that day. Mazzone responded that the Employer would be pleased with his work. The following conversation ensued:

Mazzone: I'll work hard for you throughout the day, but I just want to know, let you know, is that I would like to try to organize your workers into the Union.

Employer: What happened?

Mazzone: I'd like to organize your workers into the Union.

Employer: No, no, you not.

Mazzone. Why? I want, well, that's what I'm going to do. I believe in the Union.

Employer: Well, then you know what, there's no job for you.

Mazzone: Then there's no job for me?

Employer: You not going to come and organize my place.

Shortly thereafter, Mazzone left the facility.

Mazzone asserts that he told the Employer of his intent to organize in order to be "up front," and not surprise the Employer when the organizational efforts commenced.

The Region found that the Employer extended a job offer to Mazzone before Mazzone mentioned the Union, and

² Mazzone stated that he brought the tape recorder in order to have a record of the conversation, to protect Mazzone against any future claims by the Employer. Mazzone did not specify what types of claims he expected the Employer to make against him.

 $^{^{3}}$ Mazzone submitted a copy of the tape recording, and the investigating Board agent transcribed the tape.

that he revoked the offer upon learning that Mazzone intended to organize the Employer's workers. 4 Based on these factors, the Region has concluded that the facts establish a prima facie case of discriminatory refusal to hire.

Four months later, the Union filed unfair labor practice charges against the Employer. The Union has not engaged in other attempts to organize the Employer's employees.

ACTION

We conclude that the Employer violated Section 8(a)(1) and (3) when it refused to hire union salt John Mazzone because of his stated intention to organize the Employer's workers.

As mentioned above, the Region has determined, and we agree, that the facts establish a prima facie case of discriminatory refusal to hire. Thus, the only issue before us is whether Mazzone was a "bona fide applicant" for employment.

With respect as to where an alleged disciminatee is a bona fide applicant, the burden is on the employer to show that the employee is not seeking employment in a bona fide fashion, once the General Counsel establishes an unlawful motivation for the employer's refusal to hire. A bona fide applicant is generally understood to be one who is available for employment at the time of application; has the ability and experience; and would have accepted the work if tendered.

 4 According to the Employer, an employee was hired in August 1998 and left about three months later. Another employee was not hired until December 1998 and worked until March 1999.

⁵ Merit Electric Co., Inc., supra, slip op. at 3, fn. 6; Ultrasystems Western Constructors, 316 NLRB at 1244. See also North Bay Plumbing, Inc., 327 NLRB No. 159, slip op. 14 (March 19, 1999) (Employer's defense that applicants were not bona fide was speculative).

 $^{^6}$ <u>Bat-Jac Contracting</u>, 320 NLRB 891, fn. 3 (1996), enfd.112 F.3d 503 (2nd Cir. 1996); The <u>3E Company</u>, Inc., 322 NLRB 1058, 1062 (1997), enfd. 132 F.3d 1482 (D.C. Cir 1997) ("[t]he Union submitted resumes of 37 highly skilled

The fact that an applicant is a union organizer "cannot be used for deeming him other than a bona fide applicant." A worker "may be a company's 'employee,' within the terms of the Act, even if, at the same time, a union pays that worker to help the union organize the company."

Evidence that an individual is not a bona fide applicant for employment cannot be speculative. ⁹ Where the employer discharges or refuses to hire an applicant before the applicant has the opportunity to confirm an actual intention to work, then speculation about what would have happened had the employer not terminated the employment can not substitute for evidence. This is especially so when the absence of evidence is attributable to the party who would profit from the speculation. ¹⁰ "Where the question of whether or not an individual would have accepted employment could not be answered because of the employer's wrongful refusal to offer employment to the applicant, any doubt must be resolved against the wrongdoer whose actions created the doubt." ¹¹

and well experienced journeymen electricians whom, I must presume, were all bona fide applicants.")

⁷ Lin R. Rogers Electrical Contractors, Inc., 328 NLRB No. 163, slip op. 2, fn. 8 (August 6, 1999) (fact that employee had worked two years previously as union organizer does not mean he had no interest in work as electrician); (Merit Electric Co., supra, 328 NLRB at slip op. 1-2 (employer did not meet burden of valid business justification based on fact that applicant was employed as IBEW local's business manager for 17 years and was leaving that position to organize electric contractors).

⁸ NLRB v. Town & Country Electric, Inc., 516 U.S. 85 (1995).

⁹ <u>Arrow Flint Electric Co., Inc.</u>, 321 NLRB 1208 (1996); <u>North Bay Plumbing, Inc.</u>, <u>supra</u>, 327 NLRB at slip op. 14.

^{10 &}lt;u>Ibid.</u>; <u>North Bay Plumbing</u>, <u>Inc.</u>, <u>supra</u>, 327 NLRB at slip op. 14.

¹¹ The Board has "explicitly applied that requirement to an employer who claimed a union organizer would not have accepted a position with it. . ." Ibid.

Further, even if the employee's conduct is designed in part to provoke an employer to commit unfair labor practices, that would not deprive the employee of the Act's protection. 12 Thus, an article in a union newsletter congratulating union salts for causing "dissension" at the workplace did not justify their discharge. 13 Further, the fact that a salt taped the employer's conversations did not deprive the employee of bona fide status. 14 For even if "one of the purposes of the 'salting' program was to provoke nonunion employers to commit unfair labor practices", it is no defense to unlawful conduct. 15 Even where the applicant knows that the employer's hiring policy is discriminatory and illegal, his application for work is not in bad faith where the evidence indicates that the applicant would have accepted an offer of employment. 16

Based upon the foregoing principles, it is difficult on the present record to conclude that the charging party

¹² M.J Mechanical Services, Inc., 324 NLRB 812 (1997).

¹³ Godsell Contracting Inc., 320 NLRB 871 (1996)

¹⁴ Arrow Flint Electric Co., Inc., supra, 321 NLRB at 1209 (bona fide employee, even though he lied on resume, arranged for employer to lie on his behalf, surreptitiously tape recorded employer's agents, and had not worked at all before he was fired.); Braun Electric Co., Inc., 324 NLRB 1, 3 (1997) (The "videotaping was a way to document what occurred during the employment application encounter and did not cause the activity to lose the protection of the Act.")

^{15 &}lt;u>Ibid</u>. See also <u>NLRB v. Bat-Jac Contracting, Inc</u>., 112 F.3d 503 (2nd Cir. 1996), enfg. 320 NLRB 891, fn. 3 (1996) (Even if a defense that applicants "deliberately induced" the employer to violate the Act exists under the Act -- "and [the employer] cites no support for this claim" -- here, it was employer who initiated discussions); <u>Custom Topsoil</u>, 328 NLRB No. 66, slip op. 5 (5/20/99) (unfair labor practice, where employer refused to hire 16 experienced applicants because application contained language that "if hired I will perform all duties to the best of my ability" and will also "attempt to organize. . .")

 $^{^{16}}$ NLRB v. Swinerton, 202 F. 2d 511, 515 (9th Cir. 1953).

is not a bona fide applicant. 17 There is no contention that Mazzone was unqualified, or that he was unavailable for appointment at the time he applied for the position with the Employer. Further, Mazzone specifically accepted the offer of employment. Thus, when the Employer told Mazzone that he could begin work that morning, Mazzone assured the Employer that he would be pleased with his work, and stated that "I'll work hard for you throughout the day. . ." Further, as discussed above, Mazzone's open acknowledgement that he intended to organize the employees did not operate to deprive him of the Act's protection, even if it was timed in part to provoke the Employer into violating the Act. Nor did the fact that he taped the employment interview undermine his status as a bona fide applicant. 18

It is true that there are a number of factors which cast some doubt on Mazzone's true intentions to work for the Employer and organize his employees. These include the small size of the Employer's workforce; the timing of Mazzone's announcement, coming after the offer of employment and before the start of work; his subsequent lack of interest in organizing the Employer; and his delay of four months before filing an unfair labor practice charge. However, these facts amount to no more than speculation about what would have happened had the Employer not refused to hire Mazzone. Here, any questions as to Mazzone's bona fide status were left unanswered because of the Employer's wrongful refusal to offer him employment, and these doubts must be resolved against the wrongdoer whose actions created the doubt. 19

Accordingly, we conclude that the Region should issue a complaint, absent settlement, consistent with the foregoing. 20

18 Arrow Flint Electric Co., Inc., supra, 321 NLRB at 1209; Braun Electric Co., Inc., supra, 324 NLRB at 3.

^{19 &}lt;u>Arrow Flint Electric Co.</u>, <u>supra</u>, 321 NLRB at 1209; <u>North Bay Plumbing</u>, <u>Inc.</u>, <u>supra</u>, 327 NLRB at slip op. 14 (March 19, 1999).

²⁰ It is unclear whether the job the individual would have been hired to perform is ongoing. However, if the job is concluded, then some sort of preferential hiring is appropriate. Of course, the issue of backpay will be addressed in the compliance stage, and will depend on evidence concerning the applicant's efforts to seek interim employment or other factors tht might mitigate backpay.

B.J.K.

See Aneco, Inc., Case 12-CA-15738, Advice Memorandum dated December 14, 1994.